IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition No. 9382 of 2004

Balasaheb Sanap and ors.. petitioners

vs

State of Mah and ors.. respondents

with

Writ Petition No. 9383 of 2004

Shravan P Bhavar .. petitioner

vs

State of Mah and ors. respondents

with

Writ Petition No 9384 of 2004

Rajan Vichare ..petitioner

vs

State of Mah and ors.. respondents

with

Writ Petition No. 9448 of 2004

Rajan Vichare .. petitioner

vs

State of Mah and ors.. respondents

Mr.A.Y.Sakhare, Senior Advocate with Mr. Rajesh Datar i/b Pankaj Das for petitioners

Mr. V.A.Thorat, Advocate General with Mr.N.P.Deshpande and Mr.R.M.Patne,AGP for respondent no l State

Mr V.A.Gangal with Mr.S.S.Deshmukh for respondent no.2 in W.P.No.9382 of 2004

with

Writ Petition No. 9362 of 2004

Mrs Jyoti Suresh Kalani .. petitioner

vs

Ulhasnagar Municipal Corpn and anr..respondents

Mr. Shrihari Aney, Senior Advocate with

Mr. L.M.Acharya for petitioner

Mr. Rajendra Desai for respondent no.l

Mr.V.A Thorat, Advocate General with Mr. N.P.Deshpande and Mr.R.M.Patne AGP for State

CORAM;A.P.SHAH & S.C DHARMADHIKARI JJ.

Dated 15.l2.2004

Per Shah J.:

1. In these writ petitions the Ordinances issued by the Governor viz the Maharashtra Ordinance No.XXV of 2005 and Maharashtra Ordinance No.XXXIII of 2004 on 2lst August, 2004 and l7th November, 2004 respectively providing for temporary postponement of elections of Mayor and Dy Mayor of certain Municipal Corporations are challenged by the petitioners. The main challenge is on the ground that the Ordinances are mere colourable device to set aside the orders passed by this court to hold the elections of Mayor and Dy Mayor, in accordance with the election programme dated 4th November 2004 declared by the Under Secretary, Urban Development Department. The Ordinances are also challenged on the ground that they are inconsistent with Chapter IXA of the Constitution

of India which has been introduced by the 74th Amendment and it is malafide exercise of power conferred upon the Governor by Article 2l3 of the Constitution of India.

2 It appears that the election of Mayor and Dy Mayor of certain Municipal Corporations were due In September and October 2004. Under section l9(l)(A) of the Mumbai Provincial Municipal Corporation Act,l949, (MPMC Act) it is provided that there shall be reservation for the office of Mayor and Dy Mayor of the Corporation for Scheduled Caste, Scheduled Tribe, Women, and Backward Class of citizen in the prescribed manner. The reservation as per section l9(l)(A) of the MPMC Act has been specified vide notification dated l6th November, 2000. Under section l9(l) of the MPMC Act the tenure of Mayor and Dy Mayor is for a period of two and half years. The provisions of section 37(l)(A) of the Mumbai Municipal Corporation, Act, l888 are pari materia and prescribe tenure of Mayor and Dy Mayor for a period of two and half years. By the Maharashtra Ordinance no.XXV of 2004 the elections of Mayor and Dy Mayor were temporarily postponed by a period of 90 days on the ground of ensuing general elections to the State Assembly with a view

to rule out any possibility of overlapping of the said election and any possible undue pressure on civil and police administration and any law and order problem or any inconvenience to the citizens. On 4th November, 2004 a letter was issued by the Under Secretary, Urban Development Department to the Commissioner of all the concerned Corporations to proceed with the election of Mayor an Dy Mayor in accordance with the notification dated l6th November, 2000. It appears that thereafter news item appeared in certain news papers indicating that the election to the post of Mayor and Dy Mayor were going to be adjourned for three months at the behest of the State Government. On the basis of the news reports Writ Petition Stamp No.29478 of 2004 and Writ Petition Stamp No.296l6 of 2004 came to be filed in respect of election of Mayor and Dy Mayor of Ulhasnagar and Thane Municipal Corporations. The petitions were posted before the learned Vacation Judge (Mohite J.), who by an interim order directed that the election process in respect of the election to the post of Mayor and Dy Mayor for Thane and Ulhasnagar Municipal Corporations shall be continued and completed as per declared election programme dated 4th November,2004. A similar interim direction came to

be issued by another learned single Judge (Oka J.) in respect of the election of Mayor and Dy Mayor in Solapur Municipal Corporation. These orders were passed on the basis that the State Government has no power under the relevant statute to postpone the election. On l7th November, 2004 the Governor issued Ordinance no.XXXIII of 2004 whereby the words "90 days" were substituted by the words "six months". It was noted in the preamble of the said Ordinance that the State Election Commissioner has declared bye elections for filling some vacancies in certain Municipal Corporations to be held on 30th November, 2004 and January 2005 and to rule out any possible inconvenience and undue pressure on civil administration and to enable the newly elected Councillors to participate in the elections to the offices of the Mayor and Dy Mayor, it is considered expedient to postpone the elections to the said offices for a further period of three months.

3 Learned Senior Consel Mr.B.P.Apte and Mr. Shrihari Aney, who made submissions on behalf of the petitioners, strenuously argued that the only object of promulgating the Maharashtra Ordinance No XXXIII of 2004 was to nullify the effect of the

orders which directed the State Government to hold the elections of Mayor and Dy Mayor as scheduled and this object has been sought to be achieved by merely issuing an Ordinance whereby the time of 90 days was extended to six months. The said Ordinance does not even purport or seek to remedy or remove the defect or lacunae but merely postpones the elections for a further period of three months and the only justification is that the elections to fill up vacancies in certain Municipal Corporations and Legislative Councils were also due. The vice of lack of statutory power, however, continues and instead of removing this vice by conferring power on the executive to postpone the elections, the Legislature chose to extend the election by simply further postponing them. The learned counsel urged that the Ordinance making power is legislative but is exercised by the executive and is amenable to judicial review if exercised in an arbitrary manner for extraneous considerations and hence it is malafide. The learned counsel also contended that the impugned Ordinances are wholly inconsistent with Chapter IXA of the Constitution which has been introduced by 74th Amendment.

4 Article 2l3 of the Constitution confers power upon the Governor to promulgate an Ordinance during the recess of Legislature when he is satisfied that circumstance exit which render it necessary for him to take immediate action. Under Clause (2) of Article 2l3 an Ordinance promulgated under the said Article shall have the same force and effect as an Act of Legislature of the State but every such Ordinance has to be laid before the Legislative Assembly and would cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of this period, resolution disapproving it is passed by the Legislative Assembly upon passing of such resolution . Therefore the power of the Governor to issue Ordinances is co-extensive with the power conferred upon the State Legislature. The position under Art l23 of the Constitution is also the same. Dealing with the criticism that Art l23 was an undemocratic provision, Bhagwati J. speaking for the majority of the Constitution bench held in R.K.Garg vs Union of India, (l98l)4 SCC 675 thus:(SCC pp 687-88, par 4):

> "Now at first blush it might appear rather unusual and that was the main thrust of the

criticism of Mr.R.K.Garg on this point- that the power to make laws should have been entrusted by the founding fathers of the Constitution to the executive, because according to the traditional outfit of a democratic political structure, the Legislative power must belong exclusively to the elected representatives of the people and vesting it in the executive, though responsible to the legislature, would be undemocratic, as it might enable the executive to abuse this power by securing the passage of an ordinary bill without risking a debate in the Legislature. But if we closely analyze this provision and consider it in all its aspects, it does not appear to be so startling,though we may point out even if it were, the Court would have to accept it as the expression of the collective will of the founding fathers. It may be noted, and this was pointed out forcibly by Dr Ambedkar while replying to the criticism against the introduction of Article l23 in the Constituent Assembly that the legislative power conferred on the President under this Article is not a

parallel power of legislation. It is power exercisable only when both Houses of Parliament are not in session and it has been conferred ex-necessitate in order to enable the executive to meet an emergent situation. Moreover, the law made by the President by issuing an Ordinance is of strictly limited duration.It ceases to operate at the expiration of six weeks from the reassembly of Parliament or if before the expiration of this period,resolution disapproving it are passed by both Houses, upon the passing of the second of those resolutions. This also affords the clearest indication that the President is invested with this legislative power only in order to enable the executive to tide over an emergent situation which may arise whilst the Houses of Parliament are not in session.Furthermore, this power to promulgate an Ordinance conferred on the President is coextensive with the power of Parliament to make laws and the President cannot issue an Ordinance which Parliament cannot enact into a law. It will therefore be seen that legislative power has been

conferred on the executive by the constitution makers for a necessary purpose and it is hedged in by limitations and conditions. The conferment of such power may appear to be undemocratic but it is not so because the executive is clearly answerable to the Legislature and if the President on the aid and advice of the executive promulgates an Ordinance in misuse or abuse of this power, the Legislature cannot only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional law complete control of the Legislature over the executive, because if the executive misbehaves or forfeits the confidence of the Legislature it can be thrown out by the Legislature. Of course the safeguard against misuse or abuse of power by the executive would dwindle in efficacy and value according (sic) as if the legislative control over the executive diminishes and the executive begins to dominate the legislature. But nonetheless it is a safeguard which protects the vesting of the

> legislative power in the President from the charge of being an undemocratic provision".

5 The above view has been approved by another Constitution Bench of the Supreme Court in A.K.Roy vs Union of India, (l982) l SCC 27l. In K.Nagraj vs State of Andhra Pradesh (l985) l SCC 523, Charndrachud C.J., speaking for the bench observed thus (SCC pp 548-49, para 3l-32):

> "It is impossible to accept the submission that the Ordinance can be invalidated on the ground of non application of mind. The power to issue an Ordinance is not an executive power but is the power of the executive to legislate. The power of the Governor to promulgate an Ordinance is contained in Article 2l3 which occurs in Chapter IV of Part VI of the Constitution. The heading of that Chapter is "Legislative Power of the Governor". This poser is plenary within its field like the power of the State Legislature to pass laws and there are no limitation upon that power except those to which the legislative power of the State Legislature is subject. Therefore,

> though an Ordinance can be invalidated for contravention of the constitutional limitations which exist upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non application of mind. Not the act of a Legislature".

6 In T Venkata Reddy vs State of Andhra Pradesh, (l985) 3 SCC l98, the Constitution Bench reiterated that an Ordinance promulgated under Articles l23 and 2l3 is a law having same force and effect as an Act of Parliament or State Legislature, as the case may. Accordingly an Ordinance should be clothed with all attributes of an Act of Legislature carrying with it all its incident,immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision.It was held that the existence of necessity for promulgating the Ordinance is not justiciable. The validity of an Ordinance cannot be tested on grounds similar to those on which an executive or judicial action is tested. The motive

of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the Legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative Act are for the determination of the legislative authority and are not for determination by the courts. An Ordinance passed either under Art l23 or under Art 2l3 of the Constitution stands on the same footing.

7 In the light of this legal position enunciated by the Supreme Court we have no hesitation in rejecting the contention that the impugned Ordinances were issued in malafide exercise of power conferred under Art 2l3 of the Constitution. The submission of the learned counsel that the Ordinances were in violation of 74th Amendment to the Constitution of India is equally without any merit. The newly added Chapter in the Constitution requires the State to regulate and/or enact laws for constitution and governance of local bodies. The provisions are mostly enabling and require the Legislature to legislate upon certain matters provided therein. It is left to the wisdom of the Legislature to make laws in relation to the tenure

of office bearers of local bodies. The Constitution provides for tenure of local bodies and not office bearers of local bodies. Under the circumstances the impugned Ordinances cannot be said to be violative of 74th Amendment of the Constitution.

8 Now the only question is whether the impugned Ordinance of l7th November 2004 is in conflict with the orders passed by this court or colourable exercise of power? It was submitted by the learned counsel appearing on behalf of the petitioners that the Ordinance No. XXXIII of 2004 has the effect of nullifying or over riding the orders passed by this court to hold elections as scheduled and the Legislature could not have directly overruled the direction or the mandate of this court by merely postponing the election for further period of 3 months,which is nothing but colourable exercise of legislative power, which ought not to be countenanced by this court. We are unable to accept the submission of the learned counsel. In Bakhtawar Trust vs M D Narayan, (2003) 5 SCC 298, the Supreme Court pointed out that the Parliament and State Legislature have plenary power of legislation within the fields assigned to them and

subject to some constitutional limitations, can legislate prospectively as well as retrospectively. This power to make retrospective legislation enables the legislature to validate prior executive and legislative Acts retrospectively after curing the defects that led to their invalidation and thus make ineffective judgments of competent courts declaring the invalidity. A validating Act may even make ineffective judgments and orders of competent courts provided it, by retrospective legislation, removes the cause of invalidity or the basis that had led to those decisions. The test of judging the validity of the amending and validating Act is, whether the legislature enacting the validating Act has competence over the subject matter; whether by validation, the said legislature has removed the defect which the court had found in the previous laws; and whether the validating law is consistent with the provisions of Part III of the Constitution.

9 In the case of Prithvi Cotton mills vs Broach Borough Municipality reported in (l969) 2 SCC 283 on page 286-87 in para 4 the Supreme Court has held as under:

"When a a legislature sets out to validate a law declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively... Granted Legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.... The legislature may follow any one method or all of them and while it does so it may neutralize the effect of the earlier decisions of the court which becomes ineffective after the change of the law.. If the legislature has the power over the subject matter and competence to make a valid law, it can at any time make such a law and make it retrospectively so as to bind even past transactions. The

> validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax".

10 In Government of U.P vs Hindustan Machine Tools Ltd reported in (l975) 2 SCC 274 on page 278- 79 in paras l0 and ll the Supreme Court has observed as under:

> "l0. We see no substance in the respondent’s contention that by redefining the term "house" with retrospective effect and by validating the levies imposed under the unmended Act as if notwithstanding anything contained in any judgment, decree or order of any court, that Act as amended was in force on the date when the tax was levied, the legislature has encroached upon a judicial function. The power of the legislature to pass a law postulates the

power to pass it prospectively as well as retrospectively, the one no less than the other. Within the scope of its legislature competence and subject to other constitutional limitations, the power of the legislature to enact laws is plenary...

ll. The State Legislature, it is significant, has not overruled or set aside the judgment of the High Court. It has amended the definition of House by the substitution of a new section 2(l5) for the old section and it has provided that the new definition shall have retrospective effect, notwithstanding anything contained in any judgment, decree or order of any court or other authority. In other words, it has removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances. If the old section 2(l5) were to define "house" in the manner that the amended section 2(l5) does, there is n doubt that the decision of the High Court would have been otherwise . In fact, it was not disputed before us that the buildings

constructed by the respondent meet fully the requirements of section 2(l5) as amended by the Act of l974".

11 In the case of Hindustan Gum and Chemicals Ltd vs. State of Haryana reported in (l985) 4 SCC l24, the Supreme Court in para 6 held as under:

"6. It is now well settled that it is permissible for a competent legislature to overcome the effect of a decision of a court setting aside the imposition of a tax by passing a suitable legislation amending the relevant provisions of the statute concerned with retrospective effect, thus taking away the basis on which the decision of the court had been rendered and by enacting an appropriate provision validating the levy and collection of tax made before the decision in question was rendered".

12 In a recent decision of the Supreme Court in Welfare Association ARP Maharashtra vs Ranjit P Gohil and ors. reported in AIR 2003 SC l266, Lahoti, J. (as His Lordship then was) reiterated that it is permissible for the legislature, subject

to its legislative competence, otherwise to enact a law which will withdraw or fundamentally alter the very basis on which a judicial pronouncement has proceeded and create a situation which if it had existed earlier, the court would not have made the pronouncement. Para 5l of the judgment at page l288, which is material for us, reads as follows:

> "51. We have already seen that the impugned Amending Act is within the legislative competence of the State Legislature. The impugned Amending Act does not either directly or indirectly overrule the judgments of this Court. The law enunciated by this Court in the two decisions was that the Executive was exercising power of requisitioning the premises in such a manner that the premises were in fact acquired under the guise or pretext of requisitioning. It was a colourable and hence a mala fide exercise of its executive power by the State. Such tainted requisition was struck down by this Court as ultra vires of the Constitution. The consequence of invalidating and striking down the requisitioning continuing for

unreasonable length of time was that such invalid requisitioning came to an end. It followed as a natural corollary that the premises in occupation of the allottee became liable to be restored to the possession of the owners. By virtue of interim orders passed by the Court, the possession of the occupants was protected and that protection was continuously enjoyed by the occupants up to the date of decision. To relieve the occupants from the hardship of sudden eviction caused by its judicial pronouncement, the Court allowed some more time to the occupants by directing the protection under the interim orders of the Court to remain in operation for some more period of time in spite of the cases having been disposed of. Allowing time to vacate the premises under the protection of the interim orders is not the same thing as issuing mandamus to vacate the premises by certain date. What the impugned Amending Act has done is to fundamentally alter the very basis of occupation of the premises by the occupants. Instead of their remaining in occupation by virtue of orders of

> allotment of requisitioned premises, the Amending Act declared that the requisitioning shall come to an end and the occupants shall become tenants under the owners who would become the landlords and the amount of compensation shall become rent."

13 In the present case the Ordinances in question merely seeks to postpone elections which were due under the relevant statute. If the Legislature was empowered to enact the statute it would logically follow that the Legislature has also power to deal with subjects under the statute. The two orders of this court relied upon by the counsel for the petitioners were passed on the basis that the State has no power under the relevant statute to postpone the elections. The power to promulgate the Ordinance nor the provisions of Ordinance whereby elections were postponed was considered by the learned Judges while passing the orders. The orders were passed on the basis of existing statutory provisions. In the circumstances it is not possible to hold that the Ordinance amounts to an attempt to occupy the field already occupied by judicial field. It is not disputed before us that

the Legislature is fully competent to enact the law and the source of power is Entry 5 in the State list. Merely because election itself is postponed by the Legislative action does not mean that the impugned Ordinance amounts to an encroachment upon the judicial field.

14 A faint attempt was made to contend that the re-promulgated Ordinance dated l7th November, 2004 was in violation of the constitutional provisions. Reliance was placed on decisions of the Supreme Court in the case of D.C.Wadhwa vs State of Bihar reported in (l987) l SCC 378 and in the case of Srichand Kasera vs State of Bihar reported in (l998) 8 SCC 725. There is no doubt that re-promulgation of Ordinance by Governor without getting them replaced by an Act of legislature may amount to violation of the Constitutional provisions. However, in the instant case, after the promulgation of the first Ordinance the House assembled only once i.e after declaration of results of general elections and that too for one day only and, therefore, Ordinance was required to be re-promulgated and it is now placed before the Assembly and therefore there is absolutely no merit in the submission that there was violation of

constitutional provisions.

15 We must also bear in mind the nature of the right which the petitioners are claiming. It is now well settled that a right to vote and contest election is not a fundamental right or a common law right. Therefore, no right is vested in the petitioners independent to the statute to vote or contest the election of the Mayor or Dy Mayor, which right flows from the statute. It has been repeatedly held by the courts that right to vote and contest election is only statutory right and it does not exist apart from statute. Thus there is no pre-existing right vested in any individual to vote and contest election. Therefore there is no infringement of any right of the petitioner which could be complained of because of postponement of the election by the Ordinances in question.

16 In view of the foregoing discussion we hold that the impugned Ordinances do not suffer from any illegality or infirmity. In the result petitions are dismissed. Rule is discharged. There shall be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE FCJURISDICTION

Writ Petition No. 9382 of 2004 & ors

Date of Judgment: l5th December, 2004

For approval and signature of:

The Hon'ble Mr.A.P.SHAH J.

The **Hon'ble Mr.S.C DHARMADHIKARI J.**

1. Whether the Reporters of the local papers may be allowed to see the judgment/order?

2. Whether to be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad and Goa offices?